

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

JOHN CUTTS,

Plaintiff,

v.

STATE OF MISSOURI,

Defendant.

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No. 4:06-CV-41 CAS

**MEMORANDUM AND ORDER**

This matter is before the Court on plaintiff John Cutts' "Motion for Joinder and Response to the Defendant's Motion to Dismiss." For the following reasons, the motion will be granted.

In the motion for joinder, plaintiff seeks leave to file a first amended complaint. The proposed first amended complaint omits the State of Missouri as a defendant and instead names as defendants Janis Berry and Phillip Jones. The Court therefore construes plaintiff's motion for joinder as a motion for leave to file his First Amended Complaint.

A plaintiff retains the right to amend his complaint once as a matter of course at any time before a responsive pleading is served. Rule 15(a), Federal Rules of Civil Procedure. A motion to dismiss or other motion under Rule 12(b) is not a "responsive pleading" within the meaning of Rules 15(a) and 7(a), Fed. R. Civ. P. See 3 James Wm. Moore et al., Moore's Federal Practice, § 15.11 (3d ed. 2005); Lockhart v. Cedar Rapids Cmty. Sch. Dist., 963 F. Supp. 805, 810 (N.D. Iowa 1997) (motion to dismiss under Fed. R. Civ. P. 12(b)(1) or 12(b)(6) is not a responsive pleading for purposes of filing an amended complaint) (citing Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1530 (9th Cir. 1995); McCrary v. Poythress, 638 F.2d 1308, 1314 (5th Cir. 1981); McDonald v. Hall, 579 F.2d

120 (1st Cir. 1978)); see also Pure Country, Inc. v. Sigma Chi Fraternity, 312 F.3d 952, 956 (8th Cir. 2002) (motion for leave to amend complaint mooted motion to dismiss pending with respect to original complaint). Because the defendant has not filed a responsive pleading, plaintiff's motion for leave to amend should be granted and defendant's motion to dismiss should be denied without prejudice as moot.

The plaintiff is reminded that it is his responsibility to serve summons and the amended complaint on the newly added defendants. See Rule 4, Fed. R. Civ. P.

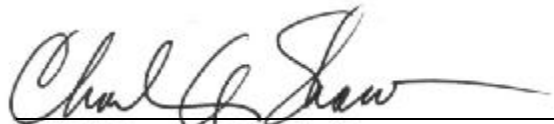
Accordingly,

**IT IS HEREBY ORDERED** that plaintiff's motion for joinder, construed as a motion for leave to file an amended complaint, is **GRANTED**. [Doc. 7]

**IT IS FURTHER ORDERED** that the Clerk of the Court shall docket the First Amended Complaint, which is attached as an exhibit to plaintiff's motion for joinder.

**IT IS FURTHER ORDERED** that the Clerk of the Court shall modify the docket sheet so that the caption of this case reads as follows: John Cutts, plaintiff, v. Janis Berry and Phillip Jones, defendants. The parties shall use the amended caption on all future filings.

**IT IS FURTHER ORDERED** that defendant State of Missouri's motion to dismiss is **DENIED as moot** without prejudice. [Doc. 3]

  
**CHARLES A. SHAW**  
**UNITED STATES DISTRICT JUDGE**

Dated this 5th day of April, 2006.